

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

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<p>State of North Dakota,  Petitioner-Appellant,  v.  Richard Dwayne Cook,  Respondent-Appellee.</p>	<p><b>SUPREME COURT NO. 20190305</b>  Civil No. 51-2019-CR-00603</p>
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**RESPONSE BRIEF OF RESPONDENT-APPELLEE  
RICHARD DWAYNE COOK**

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APPEAL FROM ORDER GRANTING MOTION TO SUPPRESS EVIDENCE  
DATED SEPTEMBER 3, 2019

THE HONORABLE STACY LOUSER, DISTRICT COURT  
STATE OF NORTH DAKOTA, WARD COUNTY  
NORTH CENTRAL JUDICIAL DISTRICT

ORAL ARGUMENT REQUESTED

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Respectfully submitted,

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**THERE IS COMPETENT EVIDENCE TO SUPPORT THE DISTRICT COURTS  
FINDINGS AND ITS DECISION TO ORDER SUPPRESSION OF THE  
EVIDENCE WAS NOT AGAINST THE MANIFEST WEIGHT OF THE  
EVIDENCE.**

1. Standard of Review
2. In reviewing a district court's decision on a motion to suppress evidence, the North Dakota Supreme Court defers to the district court's findings of fact and resolves conflicts in favor of affirmance of the lower court's decision. State v. Doohen, 2006 ND 239, ¶ 8. This standard of review recognizes the importance of the district court's opportunity to observe the witnesses and assess their credibility. Id.
3. Prima Facie Case Established
4. The Fourth Amendment of the United States Constitution and Article 1, Section 8 of the North Dakota Constitution protects individuals from unreasonable searches and seizures. State v. Ballard, 2016 ND 8, ¶ 8.
5. A warrantless search is per se unreasonable unless it falls into a narrowly defined exception to the warrant requirement. State v. Doohen, 2006 ND 239, ¶ 9.
6. At the preliminary examination on May 9, 2019, the district court heard testimony from Berthold Police Chief Allen Schmidt that Schmidt conducted a traffic stop of Respondent-Appellee Richard Dwayne Cook on April 4, 2019. App. at Page 46, Lines 18-20.<sup>1</sup> Schmidt testified that, initially, he had stopped Cook for displaying

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<sup>1</sup> Schmidt subsequently testified that the traffic stop occurred on April 3. The Information filed also reflects April 3, 2019, as the offense date (Index # 19). The defense does not dispute the traffic stop occurred April 3, 2019.

expired tabs. App. at Page 46, Lines 9-11, 18-20.<sup>2</sup> The district court heard Schmidt testify he thereafter converted the traffic stop to a criminal drug investigation. App. at Page 60, Lines 6-10. The district court heard testimony from Schmidt that Schmidt had abandoned the initial reason for the stop, the issuance of a traffic ticket, and immediately asked Cook for Cook's consent to search his vehicle. App. at Page 60, Lines 2-20. The district court heard Schmidt testify that, upon Cook denying him consent to search his vehicle, Schmidt ordered Cook from his vehicle. App. at Page 48, Lines 17-18; Page 60, Lines 16-25; Page 61, Lines 1-8. Schmidt testified that Schmidt had detained Cook and that Cook was not free to leave while Schmidt was conducting his drug investigation. App. at Page 61, Lines 2-4. The district court also heard Schmidt and Berthold Police Officer Greg Pinske conducted a warrantless search of Cook's person and property. App. at Page 49, Lines 2-4, 14-15, 20-25; Page 50, Lines 1-5, 14-15.

7. Further, at the preliminary examination, Ward County Assistant State's Attorney Jeremy Ensrud represented the State. App. at Page 43, Lines 1-13. During the preliminary examination, Ensrud engaged in a discussion with the court; acknowledging that potential suppression issues were being developed during Schmidt's testimony. App. at Page 68, Lines 18-23; Page 69, Lines 8-14.
8. In his Motion to Suppress Evidence, Cook asserted that the information relied

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<sup>2</sup> Schmidt subsequently testified at the suppression hearing that the reason for the traffic stop was for missing license plate lights. App. at Page 85, Lines 13-14. Despite this inconsistency, neither party disputes the fact that the initial stop of Cook's vehicle was proper. Traffic violations, even minor, constitute prohibited conduct and, therefore, provide officers with requisite suspicion for conducting investigatory stops. State v. Fields, 2003 ND 81, ¶ 7, citing, State v. Storbakken, 552 N.W.2d 78, 80-81 (N.D. 1996).

upon in making his motion to suppress evidence was derived, *inter alia*, from the testimony provided by Officer Schmidt at the preliminary examination. App. at Page 12, ¶ 1. Cook asserted in his motion that Schmidt had unlawfully seized Cook following the traffic stop; that Cook was not free to leave the scene; that Schmidt converted the traffic stop to a criminal drug investigation without reasonable suspicion of a crime beyond the traffic stop; and, that both Cook's person and property were searched without a warrant. App. at 15, ¶ 14-15; Page 16, ¶ 17-19; Page 19, ¶ 27-28; Page 20, ¶ 32.

9. The district court clearly took judicial notice of the evidence it received at the preliminary hearing as well as the admissions and acknowledgments made by Assistant State's Attorney Ensrud therein. App. at Page 33, ¶ 5. Applying those facts to the cases and law cited by Cook in his motion, the district court correctly found Cook had presented a prima facie case of an illegal search and seizure; shifting the burden to the State to justify its actions.
10. There is sufficient competent evidence to support the district courts' finding in this regard and it cannot be said that the decision that Cook had established a prima facie case was against the manifest weight of the evidence.
11. The District Courts Order Should Be Affirmed
12. "The Fourth Amendment of the United States Constitution and Art. I § 8, of the North Dakota Constitution protects individuals against unreasonable searches and seizures." State v. Hall, 2017 ND 124, ¶ 16, 894 N.W.2d 836.

During a valid traffic stop, an officer can temporarily detain the violator at the scene of the violation. The duration of the investigatory detention may continue as long as reasonably necessary to conduct the

officer's duties resulting from the traffic stop and to issue a warning or citation. When the original purpose of the traffic stop is complete, the officer must have a reasonable suspicion that criminal activity is afoot to continue the detention. Any further detention, without reasonable suspicion, violates the traffic offender's Fourth Amendment rights against unreasonable searches and seizures.

State v. Bell, 2017 ND 157, ¶ 8, 896 N.W.2d 913, citing State v. Adan, 2016 ND 215, ¶ 11, 886 N.W.2d 841.

13. "A detention occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.'" Richter v. N.D. Dep't of Transp., 2010 N.D. 150, ¶ 10, 786 N.W.2d 716. "A person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." State v. Bell, 2017 ND 157, ¶ 8, 896 N.W.2d 913.
14. Information known to the officer at the time of the stop must be examined to determine whether an officer had reasonable and articulable suspicion to believe that criminal activity was afoot. State v. Hall, 2017 ND 124, ¶ 21, 894 N.W.2d 836.
15. At the preliminary hearing, Schmidt testified that, other than the license plate light violation, he observed no other moving nor equipment violations. App. at Page 55, Lines 12-22; Page 56, Lines 22-25. At the suppression hearing, Schmidt confirmed that the only violation he observed was no license plate lights. App. at Page 90, Lines 12-16, 25; Page 91, Lines 1-11. Schmidt also testified at the suppression hearing that Cook pulled over immediately and appropriately to the shoulder of the highway. App. at Page 91, Lines 12-20.
16. Schmidt testified at the preliminary hearing that when Officer Pinske returned to



Schmidt's patrol vehicle after conversing with Cook up at Cook's vehicle, Pinske made no initial observations of Cook that caused Pinske concern. App. at Page 46, Lines 24-25; Page 47, Lines 1-2; Page 59, Lines 7-25; Page 60, Line 1. At the suppression hearing, Schmidt confirmed that Pinske, upon returning to Schmidt's vehicle, noted nothing unusual about Cook's behavior during his initial encounter with Cook. App. at Page 94, Lines 13-21.

17. Schmidt acknowledged at the suppression hearing that there was no reason to hold Cook other than to write him a ticket for the equipment violation. App at Page 95, Lines 24-25, Page 96, Line 1. Despite this, neither Schmidt nor Pinske commenced writing the citation. App. at Page 60, Lines 2-5, 16-20; Page 94, Lines 22-25; Page 95, Lines 1-9. Instead, Schmidt decided to conduct a controlled substance investigation; based solely on Cook's previous drug related conviction in 2016. App. at Page 60, Lines 6-10.
18. Schmidt testified that he commenced his drug investigation when he approached Cook and, almost immediately, inquired about his past involvement with past narcotics. App. at 98, Lines 11-19. The next thing that Schmidt asked Cook was if he was still using narcotics. App. at Page 98, Lines 20-24; Page 99, Lines 1-6. Schmidt then informed Cook that Schmidt and Pinske's assignment that night was drug interdiction. App. at Page 99, Lines 10-12. Schmidt said that they were looking for meth, coke, heroin, and guns. App. at Page 99, Lines 13-15. Schmidt then asked Cook if he and Pinske could search Cook's truck for those items. App. at Page 99, Lines 16-18. When Cook denied Schmidt his consent to search the vehicle, Schmidt ordered Cook out of his vehicle and to stand at the front of

Schmidt's patrol car. App. at Page 99, Lines 19-25; Page 100, Lines 1-6. As noted above, Schmidt had testified at the preliminary hearing that Cook was detained and not free to leave. App. at Page 61, Lines 2-4. Again, no attempt to prepare or issue the traffic ticket to Cook for the original purpose of the stop had yet taken place.

19. Schmidt could only conduct an investigation "reasonably related in scope to the circumstances which justified the interference in the first place." U.S. v. Jones, 269 F.3d 919 (8th Cir.2001)(vacating and suppressing evidence gained from excessive detention), citing Terry v. Ohio, 392 U.S. at 20, 88 S.Ct. 1868; see also United States v. Cummins, 920 F.2d 498, 502 (8th Cir.1990), cert: denied, 502 U.S. 962, 112 S. Ct. 428, 116 L.Ed.2d 448 (1991). "The scope of the detention must be carefully tailored to its underlying justification." U.S. v. Jones, 269 F.3d 919, citing Florida v. Royer, 460 U.S. 491, 500, 103 S. Ct. 1319, 75 L.Ed.2d 229 (1983).
20. In State v. Asbach, the North Dakota Supreme Court held that an "officer may detain an individual at the scene of a traffic stop for a reasonable period of time necessary for the officer to complete his duties resulting from the traffic stop." 2015 ND 280, ¶ 11, 871 N.W.2d 820 (citations omitted). "The Fourth Amendment of the United States Constitution is violated by the continued seizure of a traffic violator after the purposes of the initial traffic stop are completed, unless the officer has reasonable and articulable suspicion that criminal activity is afoot." State v. Deviley, 2011 ND 182, ¶ 9, 803 N.W. 2d 561. See also, State v. Fields, 2003 ND 81, 662 N.W.2d 242.

21. Here, Pinske noted nothing out of the ordinary about Cook. Schmidt observed nothing about Cook's driving that caused concern. Schmidt had confirmed that there were no warrants or "holds" out for Cook. Once Schmidt found out about Cook's prior 2016 drug charge, he abandoned anything further to do with the original purpose for the traffic stop and solely began investigating Cook for potential "drug interdiction."
22. As noted above, the district court's order regarding the suppression of evidence are given great deference and findings of fact are reviewed and conflicts are resolved in favor of affirmance. State v. Doohen, 2006 ND 239, ¶ 8. This is due to the district court being in the best position to observe witnesses and assess their credibility. Id.
23. The district court had the opportunity to observe Schmidt testify and was in the best position to assess his credibility. Having heard his testimony, both at the preliminary hearing and at the suppression hearing, the district court discounted Schmidt's other claims regarding Cook as being a pretext to justify violating Cook's Fourth Amendment Rights. App. at Page 37, ¶ 13.
24. There is sufficient competent evidence to support the district courts' findings of fact and its decision that Cook's Fourth Amendment rights were violated; requiring suppression of the evidence in this case cannot be said to be against the manifest weight of the evidence.

### **CONCLUSION**

25. The Order Granting Motion to Suppress Evidence was issued by the district court on September 3, 2019. App. at Pages 31-38. It is eight (8) pages in length and

contains the district court's thorough and well-reasoned findings following the careful consideration of testimony it received at the preliminary and suppression hearings held. The court's findings are supported by sufficient competent evidence and its' decision is not contrary to the manifest weight of the evidence. The district court did not err in ordering suppression of the evidence obtained by overreaching law enforcement and their unlawful seizure of Cook and search of his person and property. The order suppressing the evidence should be affirmed.

Respectfully submitted December 30, 2019.

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### ORAL ARGUMENT REQUESTED

The Respondent-Appellee, Richard Dwayne Cook, believes that oral argument may be helpful to the Court in deciding the issues on appeal given the procedural posture and substantive facts of this case.

**CERTIFICATE OF COMPLIANCE**

26. The undersigned, as attorney for the Petitioner/Appellee in the above matter, hereby certifies, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportionally spaced, 12 point font typeface, and the total number of pages of the above Brief totals 13 pages, inclusive.

Dated December 30, 2019

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**CERTIFICATE OF SERVICE**

27. I hereby certify that on December 30, 2019, I served the foregoing document on the following by electronic mail transmission, pursuant to N.D.R.App.P. 25 and 31:

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**CERTIFICATE OF SERVICE**

1. I hereby certify that on January 21, 2020, I served the foregoing document on the following  
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